

# Stark Law Overpayment Provisions: Heightened Obligations Amidst Continued Uncertainty Post-PPACA

Health Care Providers Need to Be Mindful of Changes and Avoid Their Pitfalls



**McClain E. Bryant** is in the Government Investigations and Compliance group at Husch Blackwell LLP.

**T**he Patient Protection and Affordable Care Act of 2010 (PPACA), which President Obama signed into law on March 23, 2010, resulted in increased oversight and obligations of health care providers in many aspects of their operations. A particularly significant PPACA reform, which has received far less attention than it is due, was the change to the Stark law overpayment provisions.

Due to the interplay between PPACA and the Fraud Enforcement and Recovery Act of 2009 (FERA), health care providers now face a notably elevated level of responsibility for discovering, reporting, and returning payments erroneously received from federal health care programs, such as Medicare. If not mindful of these changes, and careful to avoid their pitfalls, a health care provider could find itself subject to elevated financial penalties that otherwise may have been avoided.

## **STARK LAW OVERPAYMENT PROVISIONS PRE-PPACA**

Prior to PPACA, the Stark law overpayment provisions were all bark, little bite. Physicians were prohibited from referring designated health care services (DHS) to health care providers, and health care providers were prohibited from submitting a claim or billing for DHS referrals from physicians, if a financial relationship existed between the health care provider and the physician absent an applicable Stark law exception. If the health care provider received a DHS referral from a physician with whom it had a financial relationship not covered by an exception, a Stark law violation had occurred. The health care provider was not entitled to bill the DHS and had an affirmative

duty to timely report and return the overpayment; the value of the overpayment being the entire amount the health care provider received for the DHS referral.

While physicians were prohibited from making DHS referrals to a health care provider with whom that physician had a financial relationship, the physician faced no penalty under statute or regulation. The health care provider, however, was responsible for returning and reporting the overpayment within 60 days. The health care provider also was subjected to a discretionary civil monetary penalty of not more than \$15,000 for each item or service and an assessment of no more than three times the amount of each item or service wrongfully claimed (a.k.a., “treble damages”).

Completeness and timeliness of any refund was considered in determining the penalty and assessment amount, yet the health care provider faced no additional penalty for failure to timely return and report the overpayment. Further, failure to refund was neither a statutory nor a regulatory basis for Medicaid program exclusion.

### **FERA’S CHANGES TO REVERSE FALSE CLAIMS**

Prior to FERA’s amendments in 2009, a reverse false claim under the False Claims Act (FCA) occurred where “[a]ny person... knowingly ma[d]e, use[d], or caused to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government...” Thus, prior to the FERA amendments of 2009, a Stark law overpayment arguably could result in an FCA violation if a provider submitted and knowingly failed to repay an overpayment resulting from a Stark law violation.

In 2009, this language was amended by FERA to provide an FCA violation occurs where “[a]ny person...knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government or knowingly conceals or knowingly and improperly avoids or de-

creases an obligation to pay or transmit money or property to the Government...” This revision created three distinct manners for committing a reverse false claim: (1) by knowingly making, using, or causing to be made or used a false record or statement material to an obligation to pay or transmit money or property to the government, (2) by knowingly concealing an obligation to pay or transmit money or property to the government, and (3) by knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the government.

Due to the 2009 FERA amendments, any Stark law overpayment, regardless of whether a false record or statement was submitted, may now constitute an FCA violation. Accordingly, the knowing retention of an overpayment, even if that overpayment pre-dated FERA’s 2009 amendments, may constitute a violation of the FCA. An overpayment resulting in an FCA violation also subjects the health care provider to mandatory FCA civil monetary penalties between \$5,500 and \$11,000 per item or claim, as well as treble damages.

Several key definitions are important to understand. “Knowingly” is defined by the statute to mean actual knowledge, deliberate indifference, or reckless disregard. “Material” is defined as “having a tendency to influence, or be capable of influencing, the payment or receipt of money or property.” The absence of a definition for “obligation,” however, left ambiguity as to whether a Stark law overpayment resulted in an automatic violation of the FCA’s amended reverse false claim provision.

### **STARK LAW OVERPAYMENT PROVISIONS POST-PPACA**

While many of the Stark law overpayment provisions remain unaffected, PPACA, when combined with FERA’s amendments to the FCA, added some sharp teeth. PPACA adds a definition for “obligation,” which clearly includes reporting and returning any overpayment as an

“obligation” under the FCA. “Obligation” is defined as an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

The sorts of obligations that give rise to FCA liability include, but are not limited to, statutes, regulations, or retention of an overpayment. Clearly, retention of an overpayment is an “obligation.” Failure to report an overpayment within 60 days is also an “obligation” because this is a duty established by statute — the Stark law and FERA.

In addition to the Stark law’s requirements that overpayments be timely reported and returned within 60 days of when the overpayment is “identified,” PPACA added the additional requirement that the provider must provide the party to whom the overpayment is returned a written explanation of the overpayment. PPACA defines “overpayment” as any funds received or retained under Medicare or Medicaid to which the provider, supplier, or plan is not entitled after “applicable reconciliation.” “Identified,” however, was left undefined. Of small comfort, a violation under the PPACA civil monetary penalty amount “only” results in a penalty of \$10,000 per item or claim, plus treble damages, as opposed to the Stark law penalty of \$15,000. In addition, failure to timely refund or report is now a basis for Medicaid program exclusion.

## CONCLUSION

Clearly, a Stark law overpayment is a costly mistake for a health care provider to make post-PPACA. The “fix it and forget it” days have passed. Less clear is when the obligation to report and return the overpayment is triggered. “Identified” is not defined by relevant statute or regulation and has yet to be defined by the courts. It is safe to say that when a health care provider discovers a Stark law violation, has actual knowledge the reimbursement was received from services provided pursuant to prohibited referrals, and has been able to quantify the overpayment amount, then it must report and return the overpayment to the government within 60 days.

Failure to report and return the overpayment within the required timeframe is an “obligation” for purposes of the FCA. Thus, the failure to report and return an overpayment in violation of PPACA creates a basis for an FCA lawsuit, including a *qui tam* action brought by a whistleblower. Further, health care providers will be subject to Stark law civil penalties, treble damages, and assessments, as well as civil penalties and treble damages under the FCA, and these quickly add up to astronomical amounts.

To avoid overpayments and the accompanying obligations, it is best to implement a robust compliance plan with the assistance of a compliance specialist. If a Stark law overpayment is suspected, consultation of a health care compliance attorney will be essential to assessing the situation, ensuring timely return and reporting of the overpayment, and minimizing the financial impact.

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